

effect” by the Commission.²⁵ Thus, Congress did not intend that, additional new public interest obligations be imposed on DTV ancillary and supplementary services. The Commission, therefore, should not consider imposing new children’s obligations on these services.

V. PUBLIC INFORMATION INITIATIVES ARE VOLUNTARILY BEING UNDERTAKEN BY BROADCASTERS.

The Commission claims that the marketplace creates a disincentive for educational and informational children’s television programming. *1996 Report and Order* at ¶ 1. The Nielsen ratings for children’s shows bear this out indicating that many of today’s core programs are not highly rated.²⁶ Nonetheless, broadcasters’ educational and informational programs are finding some relative success²⁷, with core shows of today much more evenly distributed among the Nielsen rankings for children’s programming.²⁸

Broadcasters obviously have a vested interest in improving viewership of their “core” programming. As the Commission has noted,²⁹ however, although broadcasters are required to provide local newspapers and programming guide publishers information about their educational and informational programming, very few publishers are including E/I information in their

²⁵ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 and n. 9 (1984).

²⁶ In response to the Commission’s request for further information on children’s viewing habits, we have attached as Appendix C the May 2000 Nielsen ratings information for children’s programs.

²⁷ See Testimony of Anne Sweeney, The Walt Disney Company, Before the FCC’s *En Banc* Hearing on the Public Interest Obligations of TV Broadcast Licensees, October 16, 2000.

²⁸ See Appendix C.

²⁹ *In the Matter of Extension of the Filing Requirement For Children’s Television Programming Reports (FCC Form 398)*, Report and Order, MM Docket No. 00-44, rel. October 5, 2000 at ¶ 9.

publications. And given the overall drop in ratings for all children's shows,³⁰ it is in the best interests of broadcasters to better promote their core programming in order to build a significant audience and improve their core programming ratings. But broadcasters must be left to further these goals on their own, free from government mandates.

At the October 16, 2000 *En Banc Hearing*, Commissioner Ness challenged the broadcast industry to begin to think of innovative ways to promote E/I programming. NAB is pleased to announce the launch of its promotional campaign "*Getting The Word Out: NAB Action Kit On Children's Programming*." A draft version is attached as Appendix D. This Action Kit provides several ideas for promoting educational and informational programming, including: ways to create and distribute promotional items with local youth-servicing organizations (such as the Boy and Girl Scouts, 4-H, and Boys' and Girls' Clubs), teaming up with community partners to produce children's programming guides, having characters and stars from children's programming appear at community events, organizing essay and video contests, and ideas for piggybacking on existing public service efforts. The Action Kit is a tool broadcasters can use to get creative and try new things to promote educational and informational programming and build their audiences for "core" programming. It also includes a "plain English" summary of the federal government's children's television rules. The Action Kit represents one example of broadcasters' commitment to community service and to children. NAB urges that the Commission confine itself to encouraging broadcasters to voluntarily and creatively promote their educational and informational children's programming.

³⁰ See Appendix C; cf. Kids 2-11 Television Viewing, Nielsen Peplemeters, in the 4th Quarter 1994.

VI. THE COMMISSION SHOULD NOT ALTER ITS DEFINITION OF COMMERCIAL MATTER.

A. The Commission Should Continue To Exempt Promotions, Public Service Announcements (PSAs) and Educational Paid-For PSAs From Its Definition Of Commercial Matter.

The Commission's rules provide that promotions, PSAs promoting not-for-profit activities and paid-for PSAs are excluded from the definition of commercial matter. This was done because either no compensation is received for their airing (and thus by definition they are "not commercial") or, in the case of paid-for PSAs, airing such material was deemed in the public interest and to be encouraged.³¹ The Commission now asks if it should "require that the time devoted to . . . [PSAs and promotion of upcoming programs] nonetheless count toward the commercial limits to maximize the amount of time devoted to program material and reduce the time taken by interruptions." *Notice* at ¶ 34. NAB responds to this with a resounding "no." First, for the same reasons these "interruptions" were originally excluded from the commercial matter rule, they should remain excluded from the category of commercial matter: they are either not paid for and therefore do not fall within the definition of commercial matter directed to be adopted by the CTA or they should be encouraged to be broadcast by not being subjected to commercial limits.³²

NAB further notes that, as a practical matter, most children's network and syndicated children's programming is of standard length which serves as a natural limit to excessive interruptions. NAB is also perplexed at the Commission's seeming inclusion of *all* children's shows, not just "core" programs, in its inquiry about limiting program interruptions. NAB fails

³¹ *Report and Order*, In the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 90-570, 6 FCC Rcd 2111 at 2115 (1991) (hereinafter *1991 Report and Order*). See also *Notice* at ¶¶ 33-34.

³² *1991 Report and Order* at 2112.

to understand why, in non-educational or informational programs, the Commission is concerned with the airing of PSAs or promotions. Moreover, the promulgation of such rules would create a disincentive for broadcasters getting their commercial advertisers on-board to promote public service initiatives. Broadcasters could not add counted PSAs to an already full commercial matter load. Given a forced choice, advertisers would logically prefer commercials promoting their products to educational paid-for PSAs. Such disincentives would work against, not for, the best interests of children.

Further, were the Commission to add promotions and PSAs to the definition of commercial matter, a disincentive would be created for broadcasters to be creative in cross-promoting children's programming.³³ Broadcasters must be allowed the regulatory flexibility to attract children audiences and improve the ratings for educational and informational and non-core programming alike. Companies such as ABC are currently working hard to creatively cross-promote their products, including the *Disney Channel*, *Toon Disney*, the Disney and ABC Websites, and broadcast core programming such as *One Saturday Morning*. The purpose of such cross-promotion is to attract children to quality educational and informational programming, a goal shared by both the Commission *and* broadcasters. It makes little sense to mandate educational and informational programming while simultaneously restricting the use of promotions for upcoming educational and informational programming. Better promotion of educational and informational programming, by necessity, educates parents and children about the types of quality programming they may choose to watch.

Finally, as detailed in Section IV, the definition of commercial matter and commercial limits would not be applicable to ancillary and supplementary services because such services are

³³ *Fifth Report and Order* 12 FCC Rcd 12809, 12812.

considered by the Commission as nonbroadcast services and therefore they are not subject to Title III provisions.

B. It Is Premature to Determine How To Treat Interactive Television.

The Commission asks whether it should prohibit the use of digital television interactivity capability in children's programs to sell products. *Notice* at ¶ 32. NAB strongly urges the Commission to refrain from considering or promulgating rules in this regard until digital television interactivity becomes a reality. At this point, interactivity of television with websites is in its infancy, and is not yet available through digital over-the-air broadcast streams. To conclude at this early point to bar new capabilities before their usefulness has been explored would be unwise.

Even the exercise of distinguishing between commercial and educational websites may sweep too broadly. For example, www.britannica.com is a website that has scores of educational and informational stories and links. It also has a link to the britannica store, which sells, among, other things, educational and informational CDs and books. Thus, the question of whether the Commission should prohibit links to non-broadcast sites that also sell educational products is far from clear. It is simply too early in the digital era to attempt to forecast what types of interactive links may develop and which should be disallowed or otherwise restricted for use in children's broadcast programming. Moreover, to consider government regulation now for one potential access point (broadcast television) to the converging, linked media future is premature and unwise. NAB urges the Commission to let the various Internet technologies flower before deciding which parts to clip off for child audiences.

VII. THE CURRENT VOLUNTARY RATINGS SYSTEM SHOULD REMAIN UNCHANGED.

The *Notice* (at ¶¶ 35-37) suggests that the current voluntary television ratings system could be improved by adding new and/or different information in the digital environment. Because the existing V-Chip technical standards for the ATSC DTV system were crafted at a time when only the current television ratings system had been approved by the Commission, those V-Chip standards were written to support only that ratings system in the United States. NAB believes that the suggestion to alter the current voluntary ratings system would only serve to delay needlessly the introduction of digital televisions with V-Chip technology.

Specifically, the existing DTV V-Chip technology has two components: a Ratings Region Table (“RRT”) and a Content Advisory Descriptor (“CAD”) packet. The RRT contains a description of the rating system used in a specific country. RRTs are broadcast relatively infrequently, and they tell DTV receivers about the entire set of ratings that can be applied to a program. In the United States, for example, RRTs will contain a description of the existing Television Parental Guidelines as voluntarily adopted by the television industry and approved by the Commission. The CAD packet carries the actual rating assigned to a specific program. When a DTV set receives a CAD, it will check its contents against the RRT to ensure that the rating is valid. The DTV receiver will then react to the program based on how the consumer has programmed the television set (*e.g.*, block the program if it has a certain rating).

The manufacturers of DTV sets are just now beginning to include in their products V-Chips that function as described above.³⁴ If the V-Chip standard were to be changed to include the carriage of more or different types of information (such as a warning for age-inappropriate

³⁴ See Expedited Petition for Rulemaking in ET Docket No. 97-206 filed by the Consumer Electronics Association (Jan. 12, 2000) (asking the Commission to incorporate into its rules the existing DTV V-Chip standard, EIA-766).

promotions or commercials), then DTV receivers would likely have to be re-engineered to support the altered digital V-Chip standard. This process of both setting a new digital V-Chip standard and then producing DTV receivers in accordance with the revised standard would doubtless consume considerable time. As a result, the alteration of the current ratings system would serve only to stall the current installation of V-Chips in DTV sets and delay the overall introduction of V-Chips in the digital marketplace.

Moreover, the proposal to require promotions to be rated does not appear to be limited to V-chips in digital televisions. For analog televisions, changing the ratings system and the V-chip would be enormously disruptive to consumers. The Consumer Electronics Association has estimated to the TV Parental Guideline Council that more than 34 million V-chip equipped televisions have been sold to consumers. The current TV Parental Guidelines are embedded in chips in each of those receivers, all of which would become obsolete if the system were changed. Further, the technical standard for the ratings system allows ratings information to be sent only every few seconds and on a “space available” basis along with closed captioning. The timing of those transmissions could not be coordinated precisely with the beginning and end of specific promotions. Thus, the requirement proposed in the *Notice*, therefore, would result in some parts of objectionable promotions not being blocked, while other material to which parents had no objection would not be seen. The V-chip system was not designed to permit such rapid changes in blocking status, and the Commission should not seek to force a change that would disrupt normal viewing expectations.

In any event, NAB notes the inherent contradictions of proposals suggesting any *required* changes to a *voluntary* ratings system. NAB submits that the Commission lacks the authority to specify changes to the current voluntary system and to require broadcasters to institute those

changes. Under Section 551 of the 1996 Act, the Commission's role was only to determine whether an industry-adopted ratings system was "satisfactory." Once it did so, its role in the development of the ratings system was at an end, and Congress gave no hint that it intended the Commission to have any continuing role in the operation of the ratings system. We particularly object to the suggestion that the Commission could impose limits on commercial speech in relation to the voluntary ratings system. *See Notice* at ¶ 12. Specifically, an attempt to prevent broadcasters from running advertisements for television programs that have ratings different from the rating of the program during which the advertisements run would constitute a content-based speech restriction. Under current commercial speech doctrine, any such restrictions on the advertising of television programming implicates serious First Amendment concerns.³⁵

Finally, we note that Federal Trade Communications (FTC) Report identified some instances of marketing programs for inappropriate ages within the children's shows.³⁶ We are confident that the voluntary restraints adopted by the motion picture industry are a clear indication that the industry is taking steps to voluntarily refrain from promoting age-inappropriate materials during children's television programming.³⁷ The Commission should allow the industry to correct these few inappropriate marketing mistakes, rather than prematurely reacting with government intervention. The Commission, of course, may revisit these issues if they are not addressed promptly by industry.

³⁵ *See, e.g., Greater New Orleans Broadcasting Association, Inc. v. U.S.*, 527 U.S. 171 (1999) (finding that federal statute and implementing FCC regulation prohibiting broadcasters from carrying advertisements about privately operated commercial casino gambling violated First Amendment).

³⁶ Report of the Federal Trade Commission, *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, September, 2000.

³⁷ Press Release of Jack Valenti, President & CEO, MPAA, September 26, 2000.

VIII. ALTERING OF PREEMPTION POLICIES WOULD BE PREMATURE.

The Commission has stated that “broadcasters must provide a free digital video programming service the resolution of which is comparable to or better than that of today’s service and aired during the same time periods that their analog channel is broadcasting.” *Fifth Report and Order*, 12 FCC Rcd 12820. NAB agrees that broadcasters are still subject to the same public interest obligations on that one required free-over-the-air channel. *Notice* at ¶ 10. NAB also agrees with the Commission that digital broadcasters may have the option of airing multiple streams of programming. *Notice* at ¶ 28. As discussed in Section II, it is yet unknown whether it will be commercially viable for broadcasters in fact to air multiple streams of programming. Licensees may opt for broadcasting a single channel of high definition programming. Or a licensee may choose to provide datacasting or niche programming (such as a financial news channel), both of which may not be conducive for creating a fixed “second home” for preempted core children’s programming. *Notice* at ¶ 28. Alternatively, broadcasters may multicast in any combination of the above, or they may choose in some or several markets to broadcast a video channel of dedicated educational and informational children’s programming. It is simply premature for the Commission to revise its policies on preemptions in children’s core programming based on mere speculation of what may or could be offered with digital broadcasting. Once the digital conversion has occurred and programming options have settled out, it may be appropriate for the Commission to revisit the issue of how to handle preemptions. Until that point, however, NAB urges the Commission to continue its preemption policies as applied today.

Finally, NAB strongly urges the Commission to continue to exempt late breaking news from its core-programming preemption practices. *Notice* at ¶ 28. Broadcasters have an

obligation to serve the “public interest, convenience, and necessity” of the communities they serve. It is simply wrong-headed to consider that a broadcaster who must preempt core programming due to an emergency, such as a hurricane, thunderstorms, floods, tornadoes, etc., or for other important news should be charged with “making up” the preempted children’s programming. Broadcasters should not be faced with choosing which obligation to serve, public safety or the educational needs of children. Broadcasters are the backbone of local warnings, national warnings and sudden news. Broadcasters are also, at times, required to activate the Emergency Alert System (EAS). It is illogical for a broadcaster, who is providing critical, lifesaving information to be penalized for falling short on its educational and informational programming requirements simply because the emergency happened during core children’s programming. Fast breaking news is precisely that. The Commission should continue to rely on the good-faith journalistic discretion of broadcasters to determine whether to preempt *any* programming with news alerts.

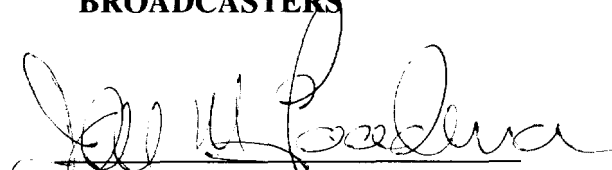
IX. CONCLUSION.

The success of free, local digital television services requires flexibility and breathing room, not new and unequal regulatory burdens (including expansive public interest duties) that their competitors in a converging marketplace are not required to bear. The public interest will be served by a successful transition to DTV, including high definition television, expanded programming choices through multicasting, and an array of new ancillary services such as datacasting, paging or Internet access. For the reasons discussed above, NAB requests that the

Commission delay its examination of children's television obligations of digital television
broadcasters until the conversion to digital television is complete.

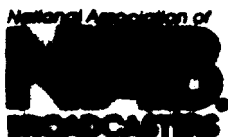
Respectfully submitted,

**NATIONAL ASSOCIATION OF
BROADCASTERS**


Henry L. Baumann
Jack N. Goodman
Valerie Schulte
Ann Zuvekas

December 18, 2000

APPENDIX A



Edward O. Fritts

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July 28, 1996

The Honorable William J. Clinton
President of the United States
The White House
Washington, D.C. 20005

My Dear Mr President:

Over the last several days, we have engaged in discussions with representatives of your Administration to determine whether a proposal could be advanced that fulfilled the objectives you have outlined to provide more educational and informational television programming to America's children.

Let me begin by making clear that we are Americans first and broadcasters second. Broadcasters agree with you that, as a Nation, our children are our most precious asset. Broadcasters take seriously their obligation to serve the needs and interests of the children in their communities, and they are particularly cognizant of the obligation to serve the educational and informational needs of children that was set forth in the Children's Television Act.

I am extremely pleased that we appear to have reached agreement with your representatives on proposed changes to the FCC's rules. An outline of this proposal, together with the text of the rules that we would jointly urge the FCC to adopt, is attached. While in many ways, this agreement incorporates provisions about which we have had reservations, we believe that the proposal overall is consistent with Congress' intent in the Act, addresses specific problems that the record before the Commission demonstrates, and provides useful guidance to licensees about the ways that they can fulfill their obligations under the Act while allowing them the programming flexibility that the FCC has always recognized is an essential element of the Communications Act. In our view, the proposal can be justified on well-accepted constitutional grounds. We fully expect that any FCC order implementing this agreement would be entirely consistent with both its letter and its spirit. If the FCC acts in that manner, we would be opposed to any effort to challenge its decision in court and I can assure you that we would not file such a challenge ourselves. We would hope that you would join with us in opposing any decision that goes beyond the boundaries of this agreement.

The proposal calls for the FCC to adopt a processing guideline under which broadcasters could obtain staff approval of the children's television service portion of their renewal applications by showing that they either aired an average of three hours per week of regularly scheduled

The Honorable William J. Clinton
July 28, 1996
Page 2

educational and informational programming for children or that, while they aired somewhat less regularly scheduled programming, they aired a package of other programs that demonstrated the same level of commitment to the needs of children. Along with this processing guideline, the FCC would adopt a revised definition of the programming that it will consider in applying the guideline and rules requiring broadcasters to engage in various kinds of efforts to inform the public about their educational and informational programming for children.

NAB is pleased that broadcasters appear to have been able to agree with the Administration on a proposal that will result, as FCC Chairman Hundt has often wished, in "a good day for kids." We will join with the Administration in urging that the FCC adopt the proposal as we and the Administration have envisioned it.

Sincerely,

A handwritten signature in black ink, appearing to read "E. J. White", with a long horizontal flourish extending to the right.

Attachments

Agreement on Children's Television Rules

1. Processing Guideline

- The Commission should adopt a three hour processing guideline.
- Under this guideline, the Mass Media Bureau will be authorized to approve the Children's Television Act portions of a broadcaster's renewal application where the broadcaster has aired three hours per week (averaged over a six month period) of educational and informational programming that has as a significant purpose serving the educational and informational needs of children ages 16 and under.
- A broadcaster can demonstrate that it has aired three hours per week of such programming in either of two ways:
 - (A) By checking a box and providing supporting information indicating that it has aired three hours per week of regularly scheduled, weekly shows that are 30 minutes or longer and that otherwise meet the definition of "core programming" (see below), or
 - (B) By showing that it has aired a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of core programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming.
- Broadcasters that do not meet this guideline will be referred to the Commission, where they will have a full opportunity to demonstrate compliance with the Children's Television Act, e.g., by relying in part on sponsorship of core educational/informational programs on other stations in the market that increases the amount of core educational or informational programming on the station airing the sponsored program and/or on special nonbroadcast efforts which enhance the value of children's educational and informational television programming.

2. Definition

- The Commission should tighten the definition of programming “specifically designed” to educate and inform children -- “core programming.”
- Core programming is regularly scheduled, weekly programming of at least 30 minutes, aired between 7:00 a.m. and 10:00 p.m., that has serving the educational and informational needs of children ages 16 and under as a significant purpose. The educational/informational objective and the target child audience are specified in writing in the broadcaster’s Children’s Educational/Informational Television Report (see public information initiatives below).
 - While a program must be regularly scheduled on a weekly basis to qualify as core, the Commission should allow the Bureau to determine what constitutes regularly scheduled programming and what level of preemption is allowable.
- Specials, PSAs, short-form programs and regularly scheduled non-weekly programs with a significant purpose of educating and informing children ages 16 and under can help accomplish the objectives of the Children’s Television Act. They can count toward the staff level 3 hour processing guideline, as described in paragraph (B) above.
- In determining whether programming has a significant purpose of educating and informing children, the Commission will ordinarily rely on the good faith judgment of broadcasters, who will be subject to increased community scrutiny (see public information initiatives below). Commission review of compliance with the significant purpose prong of the new definition will be done only as a last resort.
- The general definition of educational and informational programming is programming that furthers the educational and informational needs of

children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs.

3. Public Information Initiatives

- The Commission should adopt measures to increase the flow of information to the public about broadcasters' educational and informational programming.
 - Broadcasters will identify core programs at the beginning of the program, in a form that is at the sole discretion of the licensee.
 - Broadcasters will provide to program guide publishers information identifying core programming, including an indication of the age group for which the program is intended.
 - Broadcasters will place in their public files completed Children's Educational/Informational Television Reports, reflecting programming efforts made during the preceding quarter, and efforts planned for the next quarter, to serve the educational and informational needs of children. The Reports will be filed quarterly, at the same time as quarterly issues/programs reports that broadcasters now prepare. The Reports will include the name of the individual at the station responsible for collecting comments on the station's compliance with the CTA, and it will be separated from other materials in the public inspection file. Broadcasters will publicize in an appropriate manner the existence and location of these Reports. For an experimental period of three years, Broadcasters will file these Reports with the Commission on an annual basis, i.e., four quarterly reports filed jointly each year, preferably in electronic form.

4. Enforcement

- The Commission will conduct a review of filed Reports at the end of three years plus individual station audits in the interim.

APPENDIX B

In the Matter of)	
Policies and Rules Concerning)	
Children's Television Programming)	MM Docket 93-48
)	
)	
Revision of Programming Policies)	
for Television Broadcast Stations)	
)	

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I am the Arthur B. Hanson Professor of Law, and Director of the Institute of Bill of Rights Law, at the College of William and Mary, Marshall-Wythe School of Law, and a Senior Fellow of The Annenberg Washington Program in Communications Policy Studies of Northwestern University. I have written extensively in the field of constitutional law, particularly in areas of civil rights and civil liberties, and the First Amendment. My books

in these fields include: *Smolla and Nimmer on Freedom of Speech* (Matthew Bender Pub. Co. 1994); *Free Speech in an Open Society* (Alfred A. Knopf 1992) (received the 1992 William O. Douglas Prize for the Most Distinguished Monograph on Freedom of Expression); *Constitutional Law, Structure and Rights in Our Federal System* (with Daan Braveman and William Banks, Matthew Bender Pub. Co., 2nd ed. 1991); *Federal Civil Rights Acts* (Clark Boardman Callaghan Pub. Co., 3rd ed. 1994); *Jerry Falwell v. Larry Flynt: The First Amendment on Trial* (St. Martin's Press, 1988); *Suing the Press: Libel, the Media, and Power* (Oxford University Press, 1986) (received the ABA Gavel Award Certificate of Merit); *Law of Defamation* (Clark Boardman Callaghan Pub. Co. 1986, with annual supplements); and *A Year in the Life of the Supreme Court* (R. Smolla, ed., Duke University Press 1995).

Statement

I. Introduction

The Commission's *Notice of Proposed Rulemaking*¹ proposes to take one of three courses of action: (1) the monitoring of broadcasted programming specifically designed to serve the educational needs of children to determine if there is a significant increase in such programming; (2) establishment of a safe harbor quantitative processing guideline for

¹ MM Docket No. 93-48.

children's educational programming; or (3) promulgation of a programming standard setting forth a specified average number of hours for children's educational programming. These alternatives are in turn anchored by a proposed definition of "core" educational programming setting forth requirements for the design, purpose, hours, scheduling regularity, programming length, and identifying information that such programming must contain.

There are no First Amendment objections to the monitoring alternative, or to the Commission's use of its persuasive powers, to encourage broadcasters to meet the worthy objectives of the Children's Television Act of 1990.² The proposed quantitative processing guideline, the proposed programming standard, and the proposed definition of core educational programming, however, violate established First Amendment principles and exceed the Commission's constitutional authority. These constitutional concerns are addressed in this Statement.³

II. Alleged Economic Market Dysfunction is Not a Permissible Basis for Regulation

The Commission's proposals are driven by the judgment that economic market forces operate to deter broadcasters from providing what the Commission believes is sufficient educational programming for children, and therefore broadcasters must be forced more

² Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (Supp. III 1991)).

³ For simplicity the quantitative processing guideline, programming standard, and definition of core programming are referred to generically throughout this Statement as the "Commission's proposals."

directly through regulation to provide additional programming.⁴ To the extent that the Commission's proposals are motivated by the judgment that "you can't . . . get this kind of programming unless you oblige it," they are predicated on a governmental interest that, as a matter of law, is not a permissible basis for FCC regulation.

"At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct. 2445, 2458 (1994). This is not some featherweight precept floating on the periphery of First Amendment doctrine, but a core constitutional principle; government action "that requires the utterance of a particular message favored by the Government, contravenes this essential right." *Id.* Indeed, in *Turner Broadcasting* the Supreme Court sternly instructed that such laws "pose the *inherent* risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or *manipulate the public debate through coercion rather than persuasion.*" *Id.* at 2458 (emphasis added). Admittedly, the Commission's proposals are not an attempt at censorship in the traditional sense; the Commission clearly is not attempting to "suppress unpopular ideas or information." But the Commission *is* quite unabashedly

⁴ This rationale has been forcefully advanced as the predicate for the current Commission proposals by Chairman Reed Hundt in numerous recent speeches and interviews. See Don Oldenburg, *Tuning in the Future of Kids' TV*, The Washington Post, September 12, 1995, at B5 col. 2 ("'You can't expect in the normal workings of the marketplace to get this kind of programming unless you oblige it,' says FCC Chairman Reed Hundt, who has championed the proposal for new rules that would require commercial networks to schedule a minimum of high-quality and innovative children's educational shows and is actively seeking the public's support for it.").

considering strategies that “manipulate the public debate through coercion rather than persuasion.” Under the First Amendment, this is something the Commission may not do.

First Amendment principles do not permit the Commission to exercise at-large authority to regulate the programming of broadcasters for the purpose of correcting perceived deficiencies in the programming generated by broadcasters within the environment of the competitive commercial marketplace. The Supreme Court has repeatedly emphasized that the regime of *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367 (1969), does not grant the Commission carte blanche authority over the programming choices of broadcasters. “Government regulation over the content of broadcast programming must be narrow,” and “broadcast licensees must retain abundant discretion over programming choices.” *Turner Broadcasting, Inc. v. FCC*, *supra*, 114 S.Ct. at 2464; citing *FCC v. League of Women Voters of California*, 468 U.S. 364, 378-80 (1984); *Columbia Broadcasting System, Inc., v. Democratic National Committee*, 412 U.S. 94, 126 (1973).

Pointedly, the Supreme Court in *Turner Broadcasting* specifically rejected the “market dysfunction” justification for the regulation of broadcasters. In direct response to the Government’s argument in *Turner* that the foundations for the *Red Lion* standard of review are not the physical limitations of the electro-magnetic spectrum but rather the “market dysfunction” that allegedly characterizes the broadcast market, the Supreme Court sharply replied that “the special physical characteristics of broadcast transmissions, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.” *Turner Broadcasting System, Inc. v. FCC*, *supra*, 114 S.Ct. at 2457, citing

FCC v. League of Women Voters, *supra*, 468 U.S. at 377; *FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 799 (1978); *Red Lion Broadcasting Company. v. FCC*, *supra*, 395 U.S. at 390. In short, the Commission's entire agenda in these proceedings is grounded in a purpose that the Constitution does not allow it to entertain.

III. The Proposed Processing Guidelines, Programming Standards, and Definition of Core Educational Programming Violate the First Amendment

A. The Proposals Intrude on the Constitutionally Protected Independence of Broadcasters

If perceived market dysfunction is not a permissible basis for tightened content-based regulation of children's broadcasting, the question becomes whether the proposals are otherwise justifiable under the First Amendment standards for broadcasting regulation currently in place. The answer, simply, is "no." The proposed safe harbor quantitative processing guideline, the alternatively proposed programming standard, and certain critical elements of the proposed definition of educational programming, all operate to dictate, either in fact or in practice, the programming choices of broadcasters. The description of what shall constitute "core" educational programming intrudes on the First Amendment freedom of broadcasters in an unprecedented manner, by dictating the purpose, hours, scheduling regularity, programming length, and identifying information that such programming must contain to satisfy regulatory requirements. For First Amendment purposes, the imposition of a minimum number of hours of specifically defined programming violates established constitutional norms whether the regulatory mechanism is a safe harbor quantitative

processing guideline or a flat-out rule; in constitutional terms, these two options present a distinction without a difference, for in either case the government is effectively imposing affirmative obligations on broadcasters to air programs falling within a definition established by the government within time parameters established by the government for a minimum number of hours established by the government. The Commission's proposals are different in kind from the forms of content-based regulation of broadcasting previously approved by the Supreme Court under the First Amendment; indeed, the proposals fall squarely within the description of the type of regulation that the Court has repeatedly insisted the FCC may not undertake.⁵

The current First Amendment standard governing broadcast regulation, as distilled in *FCC v. League of Women Voters, supra*, 468 U.S. 363 (1984), is that a regulation will be

⁵ I should stress at the outset of this Statement that it is premised on my objective evaluation of prevailing First Amendment standards as they exist today, and thus assumes that the spectrum scarcity rationale of *Red Lion* remains good law until it is overruled. It must be pointed out, however, that it is not at all clear that the Supreme Court would, if presented with an appropriate case in which to revisit the matter, continue to adhere to the spectrum scarcity rationale of *Red Lion*. See, e.g. *FCC v. League of Women Voters, supra*, 468 U.S. at 376-77 n. 11 (noting critiques of the doctrine but declining to revisit it absent a signal from Congress or the Commission that technological developments require its reconsideration); *Turner Broadcasting, Inc. v. FCC, supra*, 114 S.Ct. at 2457 (observing that "courts and commentators have criticized the scarcity rationale since its inception" but declining to address the issue). In the view of this commentator, for reasons that need not be canvassed here, the spectrum scarcity theory of *Red Lion* ultimately should and will be rejected. The argument advanced in this Statement, assumes, however, that *Red Lion* remains the governing standard; the critical point is that even under *Red Lion*, the Commission's proposals go well beyond what is permitted. And as noted subsequently in this Statement, there are additional reasons to question the efficacy of the spectrum scarcity theory in the context of current children's programming, for even if spectrum scarcity remains a legally viable theory in the abstract, it fails as applied to the record the Commission has thus far developed in these proceedings.